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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/799,172	03/12/2004	Barry Lynn Bradford	99-063-MIX	8153

7590 10/06/2004

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EXAMINER

VU, VIET DUY

ART UNIT	PAPER NUMBER
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2154

DATE MAILED: 10/06/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/799,172

Applicant(s)

BRADFORD ET AL.

Examiner

Viet Vu

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 July 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 2,3,5-11,14,16-22,26-29,31,32,34-40,44,45 and 47-53 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 2,3,5-11,14,16-22,26-29,31,32,34-40,44,45 and 47-53 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 3/12/04.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

Object to the Specification:

1. The current title is not descriptive. A new title is required that is clearly indicative of the invention to which the claims are directed.

Non-Art Rejection:

2. The following non-statutory double patenting rejection is based on a judicially created doctrine grounded in public policy so as to prevent the unjustified or improper timewise extension of the right to exclude granted by a patent. In re Sarett, 327 F.2d 1005, 140 USPQ 474 (CCPA 1964); In re Schneller, 397 F.2d 350, 158 USPQ 210 (CCPA 1968); In re White, 405 F.2d 904, 160 USPQ 644 (CCPA 1969); In re Thorington, 418 F.2d 528, 163 USPQ 644 (CCPA 1969); In re Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); In re Van Ornam, 686 F.2d 937, 214 USPQ 761 (CCPA 1970); In re Longi, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); and In re Goodman, 29 USPQ 2d 2010 (Fed. Cir. 1993).

A timely filed terminal disclaimer in compliance with 37 C.F.R. 1.321(b) would overcome an actual or provisional rejection on this ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 C.F.R. 1.78(d).

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3. Claims 2-3, 5-11, 14, 16-22, 26-29, 31-32, 34-40, 44-45 and 47-53 are rejected under the judicially created doctrine of double patenting as being unpatentable over prior U.S. Patent No. 6,728,770.

Although the conflicting claims are not identical, they are not patentable distinct from each other because claims 1-40 of the prior patent contain all limitations cited in the current claims. The current claims are simply broader in scope as that of prior patent claims 1-40.

Art Rejection:

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35

U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

6. Claims 2-3, 5-11, 14, 16-22, 26-29, 31-32, 34-40, 44-45 and 47-53 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Rabinovich et al, U.S. pat. No. 6,167,427.

Per claims 2 and 7-10, Rabinovich discloses a method and system for performing load balancing over a plurality of paths from at least one host computer to a plurality of servers comprising:

- a) determining total usage/load on each of the network devices/servers (see col 4, lines 35-53),
- b) identifying a device/server having a highest load and a device/server having a lowest load (col 8, lines 41-48),
- c) calculating a difference between the highest load and the lowest load (col 8, lines 48-50),
- d) performing the load balancing if the calculated difference exceeds a threshold amount (see col 6, lines 16-21 and col 8, lines 50-54).

It is noted that a path is associated with each network device/server routing user request to the network device/server. Rabinovich also states that any known techniques for measuring usage/load on a server in particular environment can be used (see col 4, lines 40-41).

Rabinovich does not explicitly teach measuring usage (e.g., traffic) on the paths associated with I/O devices.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to utilize Rabinovich's invention in any conventional network applications including network storage because it would have allowed balancing loads for such network resources.

Per claims 3, 5-6 and 11, Rabinovich teaches performing path balancing by redirecting user request between servers or moving resources (objects) between paths/servers (see col 4, lines 46-67).

Claims 14, 16-22, 26-29, 31-32, 34-40, 44-45 and 47-53 are similar in scope as that of claims 2-3 and 5-11 and hence are rejected for the same rationales set forth above for claims 2-3 and 5-11.

Conclusion:

7. The references cited by the examiner on PTO-892 but not relied upon are considered pertinent to applicant's disclosure.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viet Vu whose telephone number is (703) 305-9597. The examiner can normally be reached on Monday through Thursday from 8:00am to 4:00pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Follansbee, can be reached on (703) 305-8498.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 305-9600.



VIET D. VU
PRIMARY EXAMINER

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10/1/04